ORIGINAL

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D. C. 20268-0001

Revisions to Library Reference Rule	Docket No. RM98-2

COMMENTS OF TIME WARNER INC.
IN RESPONSE TO ORDER NO. 1219
(October 14, 1998)

Time Warner Inc. (Time Warner) hereby submits its comments in response to Order No. 1219 (September 8, 1998), in which the Commission proposes revisions to its library reference rule. 63 Fed. Reg. 47456.

1. Before drafting a final rule, the Commission should afford an opportunity for discussion beyond this round of comments

The proposed rule addresses important issues that warrant revisions to the rules of practice. But these issues are contentious and complicated, and the proposed rule in Order No. 1219 would radically alter a procedure that has a long and useful history in Commission practice. Thus, a careful and methodical approach in this rulemaking is indicated. Additionally, Order No. 1219's first effort at grappling with a set of longstanding, complex analytical problems has not formulated the issues with clarity and, consequently, does not yet provide a basis on which to judge the adequacy or appropriateness of any procedural approach.

For these reasons, as further explained in these comments, Time Warner recommends a conference at the Commission open to all interested parties as the best next step in defining the problems that this rulemaking is intended to address. Additionally, at least one more round of written comments is needed for an adequate development of the issues implicated by this rulemaking.

2. Revisions of the library reference rule will not and cannot resolve the problems that occasioned this rulemaking

The proposed rule raises two distinct issues that need to be analyzed separately: (1) due process requirements respecting supporting materials relied on by witnesses but not contained in their testimony or sponsored by them; and (2) the role of library references as a useful device for publicly identifying documents and making them generally available to participants in Commission proceedings, but without otherwise affecting their status.

Order No. 1219 exclusively addresses the procedures and requirements under which documents or other materials may gain the status "library reference"--a status that by definition, in both the current and proposed rule, has no evidentiary significance. Under the proposed rule, that is, materials would still undergo no change in evidentiary status simply by virtue of becoming library references. Id. at 47457, col. 3. Thus the proposal fails to come to grips with the problems experienced in R97-1 that it is meant to resolve. These issues are evidentiary in nature:

- must all foundational materials relied on by witnesses be independently sponsored into testimony, subjected to cross-examination, and ultimately validated as probative and relevant?
- if so, are all source materials and reference materials used by all witnesses necessarily foundational by definition?
- if such materials must be sponsored, when must notice of that sponsorship be provided and a sponsoring witness identified: when the testimony they underlie or support is filed?
- or when and if that testimony is challenged? or at such time as the underlying or foundational material is itself challenged?
- what is the appropriate evidentiary status and treatment of workpapers?
- when, if ever, and to what extent can a witness rely on established data systems, previously litigated studies, or standard reference sources without being able to sponsor them personally or identify another witness as their sponsor?

Such important questions rightly troubled the Commission in Docket R97-1, but none of them is resolved by the proposed rule. A better approach, we believe, would be to formulate the problems that were experienced more systematically before considering the question of procedural remedies. The Commission already has extensive rules concerning the documentary and foundational materials that must be filed in support of and simultaneously with specific types of evidence. These rather than the library reference rule may provide the vehicle for addressing issues concerning the identification, production, and sponsorship of materials that a witness relies on but cannot personally verify or validate.

3. The proposed rule threatens to destroy the usefulness of the library reference as a device for identifying materials and making them publicly available

Traditionally, the library reference procedure has served two useful purposes: (1) tagging documents or other materials with a unique identifying reference that has no effect or implication other than as an identifier; and (2) making those materials publicly available at a common depository, the Commission's docket section, and giving notice of that availability to the participants in an ongoing docket. The proposed requirement that library reference status be granted only by motion could destroy a procedure that has proved extremely useful over many years precisely because it has no evidentiary or other substantive implications and requires nothing of the Commission beyond a housekeeping function.

If the Commission desires to continue making this useful combination of functions freely available to participants in its proceedings, requiring motion practice in order to create library references would be (1) inappropriate, because neither function raises any issue on which the Commission can exercise its judgment, and (2) counterproductive, because it would make difficult and condition-bound a process whose fundamental purpose – facilitating, while also making more economical, the

free flow of information – requires ease, simplicity, and absence of uncertain consequences.

4. Some elements of the proposed rule constitute needed reforms of existing practices respecting library references

A problem under current practice is that the Postal Service and other parties sometimes file library references without adequately explaining what they contain or why they are being filed. Thus, participants often must examine a library reference simply to find out what it is and what significance, if any, it is intended or assumed to have by the filing party--questions that properly should be addressed by the notice of filing and the library reference's caption. This defeats a major purpose of the library reference mechanism, which is administrative and procedural simplicity and convenience not just for those who have to serve voluminous materials on all other participants but for those who have to review voluminous but tangential materials to determine whether they affect issues of particular individual interest.

The solution is to require in the notice of filing an adequate description of what is contained in a library reference, the form in which it is contained (format, length, etc.), and the reason it is being deposited with the Commission. These descriptions need not, and ideally should not, be lengthy or elaborate. Their purpose should be to give parties sufficient information to make informed decisions about whether to examine the library reference itself.

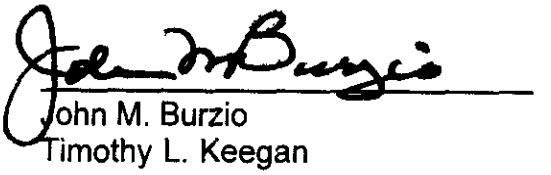
A separate and more difficult issue is presented by the fact that many library references would benefit from a more elaborate internal explanatory apparatus, such as tables of contents, better labeling of sections and parts, and executive summaries. It is difficult to address this problem by general rule, because whether a problem exists is highly dependent on the nature of the particular materials and the purpose for which they are being made available. Moreover, it is hard to conceptualize a rule that compels adequate explanations of library reference materials, because

there is no standard by which to judge adequacy. Ultimately, the interrogatory process--i.e., the normal progression of interrogatory, inadequate response, and motion to compel--may remain the proper final resort of participants who cannot otherwise adequately evaluate of make use of a particular library reference. That process does have standards by which to judge whether compulsory production of information is justified--the rules of evidence and the principles of due process--but which cannot rationally be applied to evidentiary and non-evidentiary materials alike.

Thus, requirements such as executive summaries and extensive cross-referencing to related testimony might be appropriate for materials that have an evidentiary character or whose production is required (e.g., materials intended as evidence or used as foundation for evidence, materials whose production is required by an unobjectionable interrogatory, and workpapers). On the other hand, requiring potentially onerous tasks such as cross-referencing for materials whose production in the first place is voluntary makes little sense and might serve mainly to discourage the flow of useful information that the current rule has proved valuable in facilitating. Fortunately, the Postal Service usually if not invariably responds to these situations in good faith and an accommodating spirit. An amendment to the rules encouraging better practices in this regard would not be amiss, but the case remains to be made for one mandating better practices.

The proposed rule clearly raises issues that deserve careful thought and on which the further reflections of the many members of the postal bar who have practiced before the Commission may prove of benefit. Time Warner therefore respectfully recommends that the Commission convene a conference for further discussion of these issues and that an opportunity for at least one further round of written comments be provided.

Respectfully submitted,



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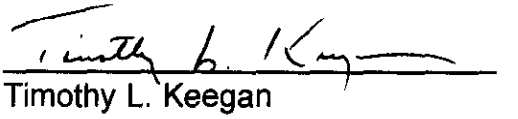

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